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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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14 UNITED STATES OF AMERICA,) No. CR 08-0399 PJH
15 v.) Plaintiff,) DEFENDANT'S MOTION IN LIMINE TO
16 JAIME SALCEDO MENDOZA,)) EXCLUDE EXPERT TESTIMONY
17 Defendant.) Pretrial Conference: August 27, 2008

18 **INTRODUCTION**

19 The government has not complied with any of the mandatory requirements of notice and
20 discovery under Federal Rule of Criminal Procedure 16 regarding expert witnesses. Nor has the
21 government met the requirements for admission of expert witness testimony under Federal Rule
22 of Evidence 702. On the current record, all government expert witnesses should be excluded.

23 **DISCUSSION**

24 **I. The Government Has Not Complied With Notice Requirements**

25 Rule 16 of the Federal Rules of Criminal Procedure requires the government to disclose
26 "a written summary of the [expert] testimony that the government intends to use." Fed. R. Crim.
P. 16(a)(1)(E). This written summary must "describe the witnesses' opinions, the bases and

1 reasons for those opinions, and the witnesses' qualifications." *Id.*

2 The government has not complied with the notice and disclosure requirements of Federal
 3 Rule of Criminal Procedure 16 for any expert witness. The remedies for failure to comply with
 4 these requirements include an order compelling disclosure and granting a reasonable
 5 continuance, or an order prohibiting the party from introducing the evidence. *See Fed. R. Crim.*
 6 P. 16(d)(2). Here, since Mr. Salcedo Mendoza objects to any continuance of the trial date, the
 7 Court should exclude all expert witnesses.

8 **II. The Court Should Exercise Its Gatekeeping Role Under *Daubert***

9 Trial courts have an important gatekeeping role with respect to expert opinion testimony
 10 under Federal Rule of Evidence 702. Apart from its notice and disclosure obligations under Rule
 11 16, the government must meet its burden for admission of expert testimony under Rule 702. If it
 12 fails to do so, the Court should exclude the testimony.

13 Under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court
 14 must ensure that proffered expert testimony "is not only relevant, but reliable." *Id.* at 589.
 15 Factors that the Court should consider include (1) whether a theory or technique can be tested;
 16 (2) whether it has been subjected to peer review and publication; (3) the known or potential error
 17 rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance
 18 within the relevant scientific community. *See id.* at 592-94.

19 The Ninth Circuit has recognized that the *Daubert* factors were not intended to be
 20 exhaustive nor to apply in every case. *See, e.g., United States v. Hankey*, 203 F.3d 1160, 1168
 21 (9th Cir. 2000). Nevertheless, a district court must make the following determinations before
 22 admitting expert testimony: (1) whether the opinion is based on scientific, technical or other
 23 specialized knowledge; (2) whether the expert's opinion would assist the trier of fact in
 24 understanding the evidence or determining a fact in issue; (3) whether the expert has appropriate
 25 qualifications, *i.e.*, some specialized knowledge, skill, experience, training or education in the
 26 relevant subject matter; (4) whether the testimony is relevant and reliable; (5) whether the

1 methodology or technique the expert uses fits the conclusions; and (6) whether the probative
2 value of the testimony is substantially outweighed by the risk of unfair prejudice, confusion of
3 the issues, or undue consumption of time. *See id.* Unless the Court resolves each of these issues
4 in the government's favor, any proffered expert testimony is inadmissible.

5 **CONCLUSION**

6 For the foregoing reasons, Mr. Salcedo Mendoza respectfully requests that the Court
7 exclude any expert witnesses proffered by the government.

8 Dated: August 13, 2008

9 Respectfully submitted,

10 BARRY J. PORTMAN
Federal Public Defender

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